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MAY 6 1997

Federal Communications Commission
Office of Secretary

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May 6, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Fifth Notice of Proposed Rulemaking
CC Docket No. 92-297

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and four (4) copies of its Reply Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
Counsel for CellularVision USA, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY 6 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

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)
Rulemaking to Amend Parts 1, 2, 21)
and 25 of the Commission's Rules to)
Redesignate the 27.5-29.5 GHz)
Frequency Band, to Reallocate the)
29.5-30.0 GHz Frequency Band, to)
Establish Rules and Policies for Local)
Multipoint Distribution Service and for)
Fixed Satellite Services)
_____)

DOCKET FILE COPY ORIGINAL
CC Docket No. 92-297

REPLY COMMENTS OF CELLULARVISION USA, INC.

CellularVision USA, Inc.¹ ("CellularVision") by its attorneys, hereby files Reply Comments in response to the *Fifth Notice of Proposed Rulemaking* ("*Fifth NPRM*") (FCC 97-82) adopted March 11, 1997 in the above-referenced proceeding.

I. INTRODUCTION

As the pioneer of the LMDS technology and the only commercially licensed LMDS provider in the United States, CellularVision urges the Commission when

¹ CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS." For purposes of this document, references to "CellularVision" include the following related companies which are majority owned and controlled by common principals: Suite 12 Group, which commenced the development of LMDS in the 28 GHz band; and CellularVision of New York, L.P., which operates a commercial LMDS service in the New York Primary Metropolitan Statistical Area in the 28 GHz band pursuant to a commercial license granted by the Commission in 1991. See *Hye Crest Management, Inc.*, 6 FCC Rcd 332 (1991).

finalizing its partitioning and disaggregation rules to afford LMDS licensees the *ultimate flexibility* to make partial assignments² of their licenses in order to "encourage spectrum savings, encourage more rapid deployment of services in the LMDS spectrum, and leave the decision of determining the correct size of licenses to the licensees and the marketplace."³

In so doing, the Commission should adopt the following rules:

- Parties should be able to *partition BTA licenses based on any service area* defined by the parties.
- Consistent with Broadband PCS and WCS, the Commission should *refrain from imposing disaggregation minimums or maximums* and allow the marketplace to determine how much or how little spectrum disaggregates will require.
- Partitioning and disaggregation *combinations should be permitted*, as this affords LMDS licensees increased flexibility in building out their systems.
- Assignors and assignees in partition or disaggregation arrangements must be given the option to meet their *individual* construction obligations — allowing the Commission to assess both the assignor and assignee's *renewal separately* under its flexible "substantial service" benchmark depending on the geographic size and/or amount of spectrum assigned and the particular type of service offered.
- While an assignee should assume the original license term of its assignor, in order not to discourage licensees from utilizing partitioning and disaggregation during the latter stages of the license term, the assignee should receive a *"renewal expectancy" based on its reduced license period*.
- A small business eligible for installment payments should be indebted to the

² As with its Comments, CellularVision refers at times to partitioning and disaggregation as an agreement between an "assignor and assignee" although technically it is obviously a "partial" assignment of a geographical service area, an amount of spectrum, or a combination of both.

³ *LMDS Second Report & Order*, para. 145.

FCC only for the *actual price paid* for the partitioned or disaggregated spectrum *where the purchase price is less* than Commission's objective valuation.

- For *non-monetary transactions*, where an assignee acquires a partitioned area or disaggregated spectrum under a barter-type arrangement, or in exchange for an equity interest in the assignee's company, the *debt obligation should remain with the original licensee*. Under this scenario, the assignee should hold its partitioned license subject to the original licensee's fulfillment of its payment obligations.

Given these objectives, CellularVision provides the following comments on a number of proposals suggested by some commenters in this proceeding.

II. MINIMUM/MAXIMUM DISAGGREGATION STANDARDS ARE UNNECESSARY

As detailed in its Comments, CellularVision is confident that disaggregation will operate most efficiently and effectively without any preordained spectrum "minimums" or "maximums."⁴ CellularVision disagrees with Texas Instruments' suggestion for a mandatory disaggregation "ceiling" that would require the original licensee to maintain a "predominant share" of its spectrum.⁵ According to Texas Instruments, an artificial ceiling would prevent "speculators" from obtaining licenses and subdividing sizable amounts of spectrum for "non-LMDS purposes."⁶

However, as Texas Instruments acknowledges, the Commission already rejected

⁴ See Comments of CellularVision USA, Inc. ("CellularVision Comments"), pp. 5-6 (filed April 21, 1997).

⁵ See Comments of Texas Instruments, Inc., pp. 4-5 (filed April 21, 1997).

⁶ See *id.*, pp. 2-3.

similar "standard" proposals for Broadband PCS and WCS.⁷ Disaggregation is no different from partitioning where the Commission is proposing to abstain from regulation by allowing parties to define their own service area boundaries within a BTA. Regardless of the size of the spectrum allocated for a particular service, the marketplace will dictate the scope and terms of desirable disaggregation proposals — permitting efficient spectrum utilization as technology develops and less spectrum may be needed. Requiring licensees to maintain a "predominant" amount of spectrum promotes spectrum *underutilization* and may artificially slow technological advances and new service offerings as LMDS evolves. In sum, LMDS licensees that *pay* for spectrum with attendant construction requirements constitute the exact type of entrepreneurs the Commission is relying upon to bring vigorous voice, video, and data competition to the marketplace, either directly or *through partitionees and/or disaggregatees*. Moreover, consistent with CellularVision's dual proposal for an independent construction requirement certification process and increased FCC scrutiny of late-term assignments, *all* disaggregators and disaggregatees will have to fulfill the Commission's "substantial service" build-out requirement — further reducing the

⁷ See *id.*, p.5, fn 8; See also *In the Matter of Geographical Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, paras. 48-49 (released December 20, 1996); See also *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, GN Docket No. 96-228, para. 99 (released February 19, 1997).

potential ability for "speculation."⁸ As a result, the imposition of artificial minimums or maximums is unnecessary and ultimately could promote the inefficient use of LMDS spectrum while reducing the potential consumer benefits from a flexible disaggregation policy.

III. FCC SHOULD RETAIN ACTIVE CONTROL OVER ALL PARTIAL LICENSE ASSIGNMENTS

As CellularVision noted in its Comments, for a variety of important reasons, all partitioning and disaggregation agreements must be subject to the Commission's formal license assignment process. In this regard, WebCel's suggestion that the original licensee should have the principal responsibility as the "prime" licensee to ensure regulatory compliance may actually discourage partitioning and disaggregation.⁹

Although WebCel's proposal is based on a concern about possible regulatory delay inherent in the Commission's approval process, CellularVision believes this concern is misplaced and, in fact, this proposal would be too onerous as it would require the original licensees to retain all compliance obligations in BTAs where partitioning or disaggregation takes place. For example, with regard to adherence to the Commission's construction requirements, CellularVision has argued that the assignor and assignee must have the opportunity to fulfill their *individual* requirements

⁸ See CellularVision Comments, pp. 7-9; 10-11, fn. 21.

⁹ See Comments of WebCel Communications on Fifth Notice of Proposed Rulemaking, p. 10 (filed April 21, 1997).

separate and apart from each other.¹⁰ An original licensee should not be burdened with this requirement or any other regulatory requirement on behalf of its assignee(s). Importantly, as previously mentioned, the Commission needs to retain the ultimate approval authority to deter unscrupulous licensees from circumventing the construction requirements, especially late-term assignments.

Moreover, WebCel's argument is based on the assumption that licensees will in fact utilize these tools to such a great degree that the Commission's record-keeping role will be too difficult to maintain. While CellularVision disagrees with this premise, if this does occur, the Commission could easily modify its rules at a later date to ease administration. In the interim, however, to prevent potential licensing delays, the Commission should consider adopting a streamlined application process whereby assignors and assignees can be assured, under normal circumstances, of the time frame governing the processing of their assignment application.

To promote maximum LMDS licensee flexibility, the Commission's proposal to treat partitioning and disaggregation as formal license assignments is necessary as it maintains individualized responsibility for regulatory compliance by *all* FCC licensees, upholds the credibility of the flexible construction rules, and ultimately encourages the use of these tools by original licensees.

IV. CONCLUSION

By implementing appropriately flexible partitioning and disaggregation rules as

¹⁰ See CellularVision Comments, pp. 7-11.

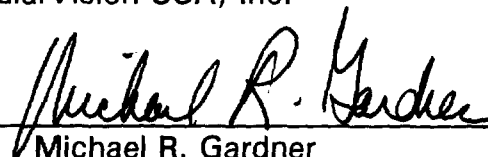
detailed by CellularVision in its Comments and Reply Comments, the Commission will "ensure realization of the competitive benefits that are at the core of [its] partitioning and disaggregation policy."¹¹ At the same time, marketplace-driven partitioning and disaggregation rules will provide the necessary flexibility for LMDS licensees, who "are in the best position to analyze their business plans, to assess new technology and to determine consumer demand."¹²

By applying a continued flexible and reasoned regulatory approach to this important final phase of the LMDS rules, the Commission's vision for LMDS will be realized in the near term as LMDS auctions will empower innovative entrepreneurs to provide the panoply of competitive LMDS-based choices in interactive video, telephony and data services throughout the United States.

Respectfully submitted,

CellularVision USA, Inc.

By:



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May 6, 1997

¹¹ *Fifth NPRM*, para. 409.

¹² *See LMDS Second Report & Order*, para. 145.

Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of the foregoing "Reply Comments of CellularVision USA, Inc." were delivered by hand, on May 6, 1997, to the following:

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